The People's Insurance Co (M) Sdn Bhd v Sykt Kenderaan Melayu Kelantan Bhd

HIGH COURT (KOTA BAHRU) — CIVIL APPEAL NO MT (2) 12–9 OF 2000
SURIYADI J
10 DECEMBER 2000

Civil Procedure *— Judgment — Variation of — Nothing to warrant denial or erosion of claim allowed in judgment — Danger of rendering judgment illusory — Whether reduction of payment due in judgment should be entertained*

Evidence *— Adverse inference — Failure to produce document — Contract of insurance not tendered — Whether adverse inference apply against insurer*

Insurance *— Motor insurance — Comprehensive policy — Protection of third party, whether privity of contract relevant — Whether claim of third party against insured party limited to injuries or death — Road Transport Act 1987 s 96(1)*

The plaintiff/respondent sued the defendant/appellant at the sessions court for loss of property in an accident wherein the plaintiff's vehicle was damaged. At the time of the accident, the defendant was the insurer of the plaintiff. The certificate of insurance confirmed that the contract of insurance was comprehensive in nature. However, the contract of insurance was never tendered. Judgment was obtained by the plaintiff against the defendant and the plaintiff executed the judgment successfully against the defendant as the insurer of the plaintiff. Hence, the appeal by the defendant. The issues raised were: (i) whether the plaintiff was a third party and not privy to the insurance contract of the defendant; (ii) whether by virtue of s 96(1) of the Road Transport Act 1987 ('the Act') and supported by the case of *QBE Insurance Ltd v Dr K Thuraisingham* [1982] 2 MLJ 62, the claim of a third party against an insured party was limited to injuries or death as provided for by s 91(1)(b) of the Act; and (iii) whether the claim as per the judgment which was limited to property loss was outside the ambit of s 96(1) of the Act.

Held, dismissing the appeal with costs:

(1) With the protection accorded to third parties by s 96 of the Act, the principle and defence of want of privity to the contract has become archaic (see p 284G).

(2) As the defendant had refused to co-operate and produce the contract of insurance within its possession, s 114(g) of the Evidence Act 1950 was invoked against the defendant. The court presumed that as the agreement could but was not produced, if produced, would certainly be unfavourable to the defendant. The part unfavourable to the defendant would be that the pertinent document would reveal the coverage of the comprehensive policy, ie to include the vehicle of a third party which would invariably cover the plaintiff in this case (see p 286D–E).

(3) Apart from looking at the status of the contract, the court could also look at the judgment itself to decide the matter. Section 96(1) of the Act has provided the statutory authority for the mandatory payment of any sum payable in the judgment to the entitling beneficiary. No reduction or restrictions of payment, inclusive of costs and interest in pursuance of some written law, must be entertained, if within the perimeters of the judgment. If nothing is indicated in the judgment to warrant a denial or erosion of a third party's claim, then nothing should be imported into it and total payment must be made. To do otherwise would render the order meted by the court an illusory judgment, with that arbitrary act not only flying against the terms of the judgment but also the law (see p 287C, F).

(4) The case of *QBE Insurance Ltd v Dr K Thuraisingham* becomes inapplicable for matters falling under the impugn provision of s 96(1) of the Act (see pp 287I–288A).

[**Bahasa Malaysia summary**

Plaintif/penentang telah mendakwa defendan/perayu di mahkamah sesyen untuk kehilangan harta dalam suatu kemalangan dalam mana kenderaan plaintif telah mengalami kerosakan. Pada masa kemalangan, defendan merupakan penginsurans plaintif. Perakuan insurans mengesahkan bahawa kontrak insurans adalah bersifat komprehensif. Namun demikian, kontrak insurans tidak sesekali dikemukakan. Penghakiman telah diperolehi oleh plaintif terhadap defendan dan plaintif berjaya melaksanakan penghakiman terhadap defendan sebagai penginsurans plaintif. Justeru itu, defendan merayu. Isu-isu yang dibangkitkan adalah: (i) sama ada plaintif merupakan suatu pihak ketiga dan tidak privi kepada kontrak insurans defendan; (ii) sama ada disebabkan s 96(1) Akta Pengangkutan Jalan Raya 1987 ('Akta tersebut') dan disokong oleh kes *QBE Insurance Ltd v Dr K Thuraisingham* [1982] 2 MLJ 62, tuntutan suatu pihak ketiga terhadap pihak yang diinsuranskan adalah terhad kepada kecederaan atau kematian sebagaimana yang diperuntukkan oleh s 91(1)(b) Akta tersebut; dan (iii) sama ada tuntutan menurut penghakiman tersebut yang terhad kepada kehilangan harta adalah di luar rangkuman s 96(1) Akta tersebut.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Selaras dengan perlindungan yang diberikan kepada pihak ketiga di bawah s 96 Akta tersebut, prinsip dan pembelaan ketiadaan priviti kontrak telah menjadi kuno (lihat ms 284G).

(2) Memandangkan perayu telah enggan bekerjasama dan mengemukakan kontrak insurans dalam miliknya, s 114(g) Akta Keterangan 1950 telah digunakan terhadap defendan. Mahkamah menganggap bahawa memandangkan perjanjian

tersebut boleh tetapi tidak dikemukakan, andainya dikemukakan, adalah padah terhadap defendan. Bahagian yang tidak memihak kepada defendan adalah bahagian dokumen yang akan mendedahkan perlindungan polisi komprehensif, iaitu termasuk kenderaan suatu pihak ketiga yang sememangnya akan melindungi plaintif dalam kes ini (lihat ms 286D–E).

(3) Selain daripada menimbang kedudukan kontrak tersebut, mahkamah boleh juga meneliti penghakiman itu sendiri untuk memutuskan hal tersebut. Seksyen 96(1) Akta tersebut telah memperuntukkan autoriti berkanun untuk bayaran mandatori mana-mana jumlah yang harus dibayar dalam penghakiman kepada benefisiari yang berhak kepadanya. Tiada penolakan atau pembatasan dalam bayaran, termasuk kos dan faedah menurut undang-undang bertulis yang ada, harus dilayan, sekiranya dirangkumi sempadan penghakiman tersebut. Sekiranya tiada apa-apa ditunjukkan dalam penghakiman untuk mewajarkan penyangkalan suatu tuntutan pihak ketiga, maka tiada apa-apa harus diimport ke dalamnya dan jumlah bayaran mestilah dibuat. Untuk berbuat sebaliknya akan menyebabkan perintah yang dijatuhkan oleh mahkamah bagaikan suatu penghakiman yang berlainan daripada kenyataan, dengan perbuatan sewenang-wenang tersebut bukan sahaja bercanggahan dengan syarat-syarat penghakiman tetapi juga undang-undang (lihat ms 287C, F).

(4) Kes *QBE Insurance Ltd v Dr K Thuraisingham* tidak terpakai untuk perkara-perkara yang diliputi oleh peruntukan s 96(1) Akta tersebut (lihat ms 287I–288A).]

Notes

For cases on judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2477–2720.

For a case on adverse inference for failure to produce document, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) para 137.

For cases on comprehensive policy of motor insurance, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 170–171.

Cases referred to

Baker v R [1975] AC 774 (refd)

Capital Insurance Bhd v Kasim bin Mohd Ali [1996] 2 MLJ 425 (refd)

Chan Wan Hong Tong v AK ACT V Chettyar AIR 1941 Rangoon 108 (refd)

Harker v Caledonian Insurance [1979] 2 Ll Rep 193 (refd)

Malaysia National Insurance v Lim Tiok [1997] 2 CLJ 351 (refd)

Mg Pein v Ma The 2 R 549; 84 IC 1009 (refd)

Pang Lim v China Insurance Co Ltd [1979] 1 MLJ 7 (refd)

Prudential Insurance Company v Inland Revenue Commissioners [1904] 2 KB 658 (refd)

QBE Insurance Ltd v Dr K Thuraisingham [1982] 2 MLJ 62 (distd)
R v Kakelo [1923] 2 KB 793 (refd)
Rafiah bte Bakar v East West-UMI Insurance Bhd [1993] 1 MLJ 39 (refd)
Shanker v Kamtaprasad Govindaprasad AIR 1947 Nagpur 129 (refd)

Legislation referred to

Evidence Act 1950 ss 101, 106, 114(g)
Road Traffic Act 1934 [UK]
Road Traffic Ordinance 1958 ss 75(1)(b), 80(1)
Road Transport Act 1987 ss 91(1), (b), (4), 96

Zamzuri bin Hussin (*Foo Say Ghee & Zamzuri*) for the plaintiff.
C Jegathesan (*C Jegathesan*) for the defendant.

Suriyadi J. : Prior to this appeal, the plaintiff ('the respondent'), had filed civil suit 53-466-1992 ('the said suit') against a company called Chan Peng Sun t/a Sykt Perniagaan Peng Sun ('the defendant') at the sessions court. In that case, the respondent had litigated the defendant founded on the tortuous allegation that its employee had driven motor vehicle WT 9869 negligently, resulting in the respondent's vehicle being damaged. The claim was restricted to loss of property with none in respect of death or bodily injury (general damages). At the time of the accident the appellant was the insurer of the defendant. On 25 November 1993, the court in the said suit ordered the defendant to pay the current respondent RM53,822, inclusive of interest. Armed with that order, the respondent promptly filed for the execution of the judgment sum against the appellant insurance company, again at the sessions court (Suit 52–296–1995). In short, a normal 'runner case' had been upgraded into an 'indemnity' case. As the facts revealed, the plaintiff on 20 December 2000 again succeeded. Being dissatisfied with the decision, the appellant accordingly filed this appeal.

Without attempting to produce a comprehensive definition, suffice if I merely remark that a contract of insurance is an agreement whereby one party, generally referred to as the insurer ('the insurance company') promises to pay the assured person a sum of money or benefits on payment of, inter alia, a money consideration (normally referred to as the 'premium'), on the happening of an event or events covered by the agreement (*Prudential Insurance Company v Inland Revenue Commissioners* [1904] 2 KB 658; *Mac Gillivray on Insurance Law* (9th Ed)). With sophistication setting in, the scope of a contract of insurance has expanded to include even a third party as beneficiaries, either by virtue of the desires of the contracting parties or the law, eg s 91(1)(b) the Road Transport Act 1987. Needless to say, this agreement will certainly be subject to the element of uncertainty, as the happening or occurrence of that event will be outside the control of the insurer. Whichever way one looks at it, in the event the latter event does occur, the eventual loser will be the insurer. Hence, its constant struggle to evade its obligations founded on breaches committed by the assured or due to some statutory restrictions. In this

appeal, the appellant had alluded to the latter excuse and on some basic legal intricacies. In a gist, the appellant's objections were that:

(a) the respondent was a third party and not privy to the insurance contract of the defendant;

(b) by virtue of s 96(1) of the Road Transport Act 1987, the successor of s 80(1) of the Road Traffic Ordinance 1958, and backed by the case of *QBE Insurance Ltd v Dr K Thuraisingam* [1982] 2 MLJ 62, the claim of a third party against an insurance party was limited to injuries or death as provided for by s 91(1)(b) of the Act (or s 75(1)(b) of the above Ordinance prior to the amendment); and

(c) as the judgment of 25 November 1993 was limited to damages on the vehicle of the respondent, the claim therefore was outside the ambit of the abovementioned s 96(1). It was thus deprived of any rights to sue and obtain satisfaction of the judgment from the appellant.

After having carefully scrutinized the three objections, I was satisfied that they were intertwined, thus making it virtually unnecessary for me to deal with them separately. I will attempt to do justice to the format of the appellant wherever necessary. To resolve the first objection it is necessary for me to reproduce s 96(1) of the Act. It reads:

> If, after a certificate of insurance has been delivered under sub-s (4) of s 91 to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under para (b) of sub-s (1) of s 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, *the insurer shall*, subject to this section, *pay to the persons entitled to* the benefit of the *judgement any sum payable* thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments. (Emphasis added.)

The prerequisites and brief effect of the above provision, inter alia, are as follows:

(1) A certificate of insurance has been delivered by the insurer to the other contracting party as per the requirements of s 91(4) of the Road Transport Act (see below);

(2) a judgment against any person insured by the policy has been obtained;

(3) the suing party must be a person entitled to the benefit of the judgment in respect of the liability; and

(4) the entitled person is also entitled to costs and interest, if covered by the judgment by virtue of any written law.

The confusion arose as s 91(1)(b) of the Act, the very basis of the appellant's defense, seemed to have watered down the effect of the above provision. It reads:

> In order to comply with the requirements of this Part, a policy of insurance must be a policy which —
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> (a) is issued by a person who is an authorized insurer within the meaning of this Part; and
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> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

In brief, this sub-provision restricts the liability only to death or bodily injury suffered by any person or class of persons specified in the policy. Nothing is said of property losses. Due to this style of legislation, whether deliberate or otherwise, the appellant had not hesitated to allude to it, and unerringly ventilated that the respondent had no locus standi to sue and exact satisfaction from it. To support its assertion, the case of *QBE Insurance Ltd v Dr K Thuraisingam* was referred to. In this latter case, the third party similarly had brought an action direct against the insurers to recover a judgment sum for property damage caused by the insured of the insurers in a road traffic accident under s 80(1) of the Road Traffic Ordinance 1958, the forerunner of the current s 96 of the Act. Wong Kim Fatt JC when allowing the appeal, held that as the judgment was in respect of property damage only, and not death or bodily injury, he thus had no statutory right of action against the insurers under ss 80(1) and 75(1)(b) of the then Ordinance. His Lordship opined:

> Section 80(1) of the Ordinance confers the statutory right to a third party armed with a judgment in respect of the liability that must be covered compulsorily, that is liability in respect of death or bodily injury (which must be a liability covered by the terms of the policy), but not property damage suffered by a third party, to sue the insurers direct for recovery of the judgment sum, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, subject, however, to the provisions of this section.

As said much earlier with the constant attempt by insurers to evade responsibility, thus in direct confrontation with the spirit and purpose of s 96, promulgated primarily to protect the rights and interest of a third party, courts must be extra careful. With the protection accorded to third parties by the latter provision, the principle and defence of want of privity to the contract, has now become archaic. James Foong J in *Rafiah bte Bakar v East West-UMI Insurance Bhd* [1993] 1 MLJ 39, regarding the right of the third party, had occasion to remark at p 43:

> This application is made in pursuance to s 96 of the Act where the insurers are under a liability by way of statute, to pay a third party who is entitled to the benefit of a judgment obtained against an insured person who has a valid insurance policy, as defined under s 91(4) of the Act, with the insurers. This statutory provision provides an exemption to the law of privity in contract. It allows recovery of money by a third person who is not a party to the contract.

It is also indisputable that insurance companies are generally in a superior position as compared to the individual, lofty enough to make the life of an incapacitated third party extremely miserable by the employment of delaying tactics. The unfortunate individual who now may be suffering financial or physical afflictions, and who normally will depend substantially on insurance handouts to see him through his handicapped lifetime, and while awaiting that handout, will invariably have to go through untold miseries. His family similarly cannot but experience the same indignities. On those premises, it is incumbent upon the court, due to the inequities of strength, to ensure that some equilibrium is maintained, in the form of a continuous vigilance over the matter before it, and ensuring that the interest of every individual is not compromised.

I now touch on the evidence. Sieving through the evidence, my efforts were rewarded when I managed to have sight of the certificate of insurance, thus resolving the question whether the appellant insurance company had delivered this highly pertinent document to the respondent (p 83 of the records of appeal). This document is relevant as the Court of Appeal in *Capital Insurance Bhd v Kasim bin Mohd Ali* [1996] 2 MLJ 425 had occasion to confirm s 91(4) of the Act, in that prior to satisfying any judgment, the insurer must beforehand deliver a certificate of insurance to the contracting party. This provision reads:

> A policy shall be of no effect for the purposes of his Part unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.

That certificate of insurance also confirmed that the contract of insurance was comprehensive in nature. In spite of the word 'comprehensive' being imprinted in the certificate, the respondent still faced a rather monumental task, as the Privy Council in *Pang Lim v China Insurance Co Ltd* [1979] 1 MLJ 7 had opined that a comprehensive policy in respect of a vehicle was one which covered all risks arising out of the use of that particular vehicle, yet it did not necessarily cover the liability of the assured to a third party when driving any other private car. That being so it became incumbent upon me to discover whether the impugned contract of insurance covered a third party or not. I was unable to obtain that piece of information, as that agreement was never tendered. Probing further, as per pp 25–26 of the records of appeal, and clarified by Mr Jega during the appeal, in spite of his attempts to obtain a copy of the contract of insurance, he unfortunately met with total failure. To recapitulate, the purpose of perusing the document was merely to conclude whether the contract covered the respondent or otherwise, which could once and for all have resolved any doubts about the scope of the appellant's responsibility. The contents of this agreement were an especial knowledge that was within the appellant's knowledge, and of which the respondent could not be

expected to be privy to. That being so, I was satisfied that this was a predicament which was within the purview of s 106 of the Evidence Act 1950, a provision containing a principle and scope that was an exception to the general rule as laid down in s 101. The appellant thus would be hard pressed not to co-operate (see *Rex v Kakelo* [1923] 2 KB 793; *Sarkar on Evidence* (13th Ed) at p 961). It should also not be allowed to conceal from the court the evidence in its possession which could assist the court in arriving at a correct decision (*Shanker v Kamtaprasad Govindaprasad* AIR 1947 Nagpur 129). In the latter case, the court had decided that even where the burden of proving the alleged debt did lie with the defendant, a deliberate omission on the part of the plaintiff to produce the useful account books in his possession, would entitle the court to raise the presumption that if the accounts were produced they would not support the case of the plaintiff. Sarkar at p 963 also had occasion to touch on *Mg Pein v Ma The* 2 R 549: 84 IC 1009, where the court had held that as a party had failed to give the fullest information about the relationship existing between him and another, the court could draw a presumption unfavorable against that party (see also *Chan Wan Hong Tong v AK ACT V Chettyar* AIR 1941 Rangoon 108). In the current case, the roles were reversed in that the documents that could assist the court were in the possession of the appellant. As the latter had refused to co-operate I felt obliged to invoke s 114(g) of the Evidence Act, and presume that as the agreement that could but was not produced, if produced, would certainly be unfavorable to it. The part unfavorable to the appellant would be that that pertinent document would reveal the coverage of the comprehensive policy, ie to include the vehicle of a third party which will invariably cover the respondent in this case.

Apart from the above approach of focusing on the scope of the contract which still rebelled against the interest of the appellant in this case, the highest appeal court in *Malaysia National Insurance Sdn Bhd v Lim Tiok* [1997] 2 CLJ 351 has amply endorsed the approach of merely focusing on the judgment. This case, which apart from affirming the views of James Foong J in *Rafiah bte Bakar*, had also discussed in detail the responsibility of an insurance company towards a third party under the then s 80(1) of the Ordinance. Without going into the details, suffice if I merely reproduce the relevant remarks of Edgar Joseph Jr FCJ at p 375, which reads:

> Having regard to the natural meaning of the words appearing in s 80(1) of the Ordinance and the purpose underlying the legislation for compulsory motor insurance against third party risks in road accidents, which is to give full and effective protection to injured third parties, our view is that it is *the total sum* payable under a judgment in respect of the liability of an insured to a third party which an insurer is required to pay to such third party. (Emphasis added.)

This case also endorsed the minority view of Lord Denning in *Harker v Caledonian Insurance* [1979] 2 Ll Rep 193, especially with reference to His Lordship's remarks regarding the phrase 'pay to the person entitled to the

benefit of the judgment any sum payable thereunder in respect of the liability', which appeared in s 10(1) of the UK Road Traffic Act 1934. With reference to those words, Lord Denning had opined that they 'mean the judgment sum. It is the total sum payable thereunder.' Lord Denning further said:

> I see no justification for limiting those words to a part only of that sum. It is the judgment sum which has to be paid by the insurer.

By this approach, the status of the contract of whether it is comprehensive or third party, becomes irrelevant, as after judgment has been obtained, that exhausted document becomes obsolete and relegated to the rear seat. To appreciate this remark, a scrutiny of the pivotal s 96(1) is a must. This provision, in no uncertain terms, has provided the statutory authority for the mandatory payment of any sum payable in the judgment to the entitling beneficiary. No reduction or restrictions of payment, inclusive of costs and interest in pursuance of some written law, must be entertained, if within the perimeters of the judgment. James Foong J in the above case of *Rafiah* in crystal clear terms had said '… By the use of the words 'the insurer shall', statute has imposed a mandatory duty upon the insurers concerned to pay to the person entitled to the benefits of the judgment any sum payable thereupon'. Surely if a restriction were envisaged by the legislature, why then are the factors of costs and interest, more akin to specific damages and which certainly do not fall within the ambit of 'in respect of the death of or bodily injury to any person' (s 96(1)), be made payable? If ever there are to be any, then the source will have to be the contract of insurance itself. The court will have to make a finding of fact and decide whether the scope of the latter is wide enough to include a third party, with the outcome being reflected in the scope of the judgment.

To conclude on the above matter, if nothing is indicated in the judgment to warrant a denial or erosion of a third party's claim, then nothing should be imported into it and total payment must be made. To do otherwise will render the order meted by the court an illusory judgment, with that arbitrary act not only flying against the terms of the judgment but also the law. With a decisive provision backing the payment of any sum recorded in the judgment, any non-adherence of that judgment, founded on some misconceived interpretation must be frowned upon by the judicial system. It is also clear that by now the contract of insurance, having been superseded has become antiquated. Returning to the current facts, after having scrutinized the judgment repeatedly, I was unable to pinpoint any part of the judgment that reprieved the appellant from any payments payable thereunder, or that the respondent's entitlement was restricted only to general damages.

With *Pang Lim v China Insurance Co Ltd* (deliberated by the Privy Council) being in the same league with *Malaysia National Insurance v Lim Tiok*, and with the latter being more in point and better argued, I am more partisan towards it (*Baker v R* [1975] AC 774). With that preference, the case of *QBE Insurance Ltd v Dr K Thuraisingham* thenceforth becomes inapplicable for matters falling under the impugn provision of

s 96(1) of the Act. After due consideration of the available facts, and bound by the maxim of stare decisis, I have no hesitation in dismissing this appeal with costs.

Appeal dismissed with costs.

Reported by Moy Saw Han